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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 155

DONALD S. CREAMER, *Petitioner*

v.

THE UNITED STATES

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner, Donald S. Creamer, respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Claims in this case. Judgment was entered on February 18, 1966, and the Court's opinion and judgment were likewise dated February 18, 1966.

## OPINION BELOW

The opinion of the Court of Claims is not yet officially reported. It is, however, printed in full in Appendix A to this petition.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255, which provides that cases in the Court of Claims may be reviewed by the Supreme Court by writ of certiorari on petition of claimant.

## QUESTIONS PRESENTED

This case presents three questions of great importance to all classified federal employees and to all federal employees entitled to the protections of the Veterans' Preference Act of 1944, as amended. These questions are as follows:

1. Can a federal agency arbitrarily use a Performance Evaluation Plan which has never been submitted to or approved by the Civil Service Commission, as required by the Performance Ratings Act of 1950 and which does not otherwise comply with the standard minimum requirements of that Act, to rate or evaluate the work performance of its federal employees and capriciously to deny them their statutory pay increases?

2. Can a federal agency, *in violation of its own Regulations* and of the statutory protections afforded to veteran-federal employees by the Veterans' Preference Act of 1944, reduce or deny an increased rate of compensation which has already accrued in favor of such an employee and simultaneously deprive him of his statutory right of appeal to the Civil Service Commission?

3. Whether the "Acceptable Level of Competence" provisions of the Federal Salary Reform Act of 1962 (5 U.S.C. 1121 (a)), as here arbitrarily applied to deprive petitioner of an accrued statu-

tory increase in pay, violate Article I, Sections 1 and 8 of the Constitution and the Fifth Amendment to the Constitution?

## STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix B, pp. 11a-15a.

## STATEMENT

Petitioner, an attorney at law, served as a federal employee almost continuously since 1934—i.e. for approximately 30 years. During the last 20 years of his employment, he held a position as an attorney with the Veterans Administration's Board of Veterans' Appeals. The Board has jurisdiction over all appeals arising from veterans' claims for benefits under the laws administered by the Veterans Administration (38 U.S.C. 4004); and decisions rendered by the Board are final (38 U.S.C. 4004 (a)).

Petitioner's principal duty for the Board was to draft and write proposed decisions for the Board itself. Because of his long experience, knowledge and skill, petitioner was regularly assigned only "the most involved and difficult cases"; those involving serious questions of law "for which there (were) no precedents" (*Govt. Ex. A*). The official Job Description covering petitioner's position also required him to perform his duties with "*no* technical supervision", and he was fully expected to "utilize his own initiative and judgment in evaluating evidence, in making findings of fact and reaching conclusions of law".

The Stipulation of Facts in the record herein shows that, although petitioner's work assignments were consistently difficult, complex and unique, his performance

ratings, certified by his superiors under the standards prescribed by the Performance Ratings Act of 1950 (5 U.S.C. 2001 et seq.) were always "Satisfactory or better". The term "satisfactory" is defined by the last mentioned Act as "corresponding to an efficiency rating of 'good' under the Veterans' Preference Act of 1944, as amended, and under laws superceded by this chapter" (5 U.S.C. 2005). The same Stipulation of Facts referred to above shows that petitioner continued to receive these same good performance ratings up to and including the date of his retirement from the federal service in December, 1964.

On June 23, 1963, however, prior to his retirement, petitioner completed the statutory waiting period prescribed by 5 U.S.C. 1121 to entitle him to an in-grade increase in pay of $365. per year, i.e. an increase from Grade GS 13d, $12,245. per annum, to Grade GS 13e, $12,610. per annum. *As stated above, petitioner's periodic performance and efficiency ratings were uniformly good up to and beyond that date, and at no time prior thereto had petitioner received any notice (such as that prescribed by the Veterans Administration regulations) that he would not be eligible for the said statutory increase.*

On June 26, 1963, however, several days after the statutory waiting period for the pay increase expired, one of petitioner's immediate superiors wrote to him stating that a decision had been reached that petitioner was not eligible for the said pay increase because his work performance allegedly was *not "of an acceptable level of competence"*. That ruling stemmed from the following developments: Prior to October 11, 1962, classified federal employees were entitled *automatically* to receive in-grade statutory increases in pay under

5 U.S.C. 1121 if, among other things, they possessed *"a current performance rating of 'satisfactory' or better"*. On October 11, 1962, however, Congress amended 5 U.S.C. 1121 *solely to the extent of substituting, in lieu of the last mentioned requirement, the condition that, in order to be eligible for the increase, the employee's work should be "of an acceptable level of competence as determined by the head of the department"* (Pub. L. 87-793, 76 Stat. 847).

The 1962 amendment, however, totally unlike the Performance Ratings Act of 1950 (5 U.S.C. 2004), failed to prescribe any minimum *"standards"* or *"requirements"* uniformly to govern the operation of these new performance rating procedures in all of the various federal agencies. Thus, on January 7, 1963, President Kennedy apparently felt constrained to issue Executive Order 11073, wherein he directed the Civil Service Commission (the same agency which administers the Performance Ratings Act) to "issue regulations and *standards*" to govern the operation of the "acceptable level of competence" ratings provided by the 1962 amendment.

Contrary to that Executive Order and long-standing procedures under the Performance Ratings Act, however, the Civil Service Commission failed completely to prescribe any *"standards"* of any kind to insure that the "acceptable level of competence" provisions of the 1962 Act would be fairly, uniformly and evenly administered by the federal agencies. *Instead, it simply announced in the Federal Personnel Manual (Ch. 531, Sec. 4-9) that the 1962 amendment provided the federal agencies with a new "valuable management device" for rating federal employees with or without "specific,*

*established work standards"*, and the Commission stated:

> "When specific work standards have not been established, . . . work must be viewed in the light of other pertinent criteria . . ."

Moreover, without any basis or authority in the 1962 Act itself and contrary to the appeals procedures set forth in the Performance Ratings Act (5 U.S.C. 2006, wherein the Commission itself controls all agency performance rating appeals systems), the Civil Service Commission gratuitously announced further (5 C.F.R. 531, Sect. 407 (d)):

> "There is no right to a review by the Commission of a department's determination (of "unacceptable level of competence") . . ."[1]

Having received these odd pronouncements from the Civil Service Commission, petitioner's superior, the Chairman of the Board of Veterans' Appeals, announced that he would establish his own "guidelines and instructions for determining 'Acceptable Level of Competence'" (*Govt's. Ex. C*). He stated, first of all, that such determinations will be "separate and apart from annual performance ratings" (*Govt's. Ex. C*). *He then went on to say that "in the absence of (specific written) standards, responsible supervisors must base their determinations on the best information available to them"* (*Govt's. Ex. C*).

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[1] As hereinbelow stated, Congress, in 1965 struck down this grossly improper, unlawful Commission regulation by expressly amending 5 U.S.C. 1121 to re-affirm the federal employee's absolute right of appeal to the Commission from any adverse finding of unacceptable competence (Pub. L. 89-301, 5 U.S.C. 1121 (c)).

The said announcement then went on to prescribe what it called "guidelines for use in determining whether an employee is performing at an acceptable level of competence" (*Govt's. Ex. C*). Stated as simply as possible, these "guidelines" were as follows:

> " . . . Performance at 100% *productive effectiveness* denotes the average expected for all legal . . . consultants as a group. . . . It is recognized that some individuals will produce either above or below this expected average . . .
>
> "On the other hand, *standards of quality* . . . are not based on the average. A rating of 100% *qualitative effectiveness* denotes "top quality" . . . It would be unusual if an employee ever reached 100% quality and maintained it over a substantial period." (Italics supplied)

The announcement then went on to provide these additional alleged "guidelines":

> 1. If an employee's overall efficiency index is 90% to 114%, including minimum productivity of 85% and quality of 80%, *a strong presumption exists in favor of granting a regular step increase.*
>
> 2. If an employee's overall efficiency index is 85-89%, including a minimum productivity and quality of 80%, an employee *"might qualify"* for a step increase; *"but there is no presumption in favor of entitlement".*
>
> 3. If an employee's overall efficiency index ranges between 75% and 84%, *a strong presumption exists that he does not qualify.* But, regarding these cases, petitioner's superior stated:
>
> "In this category, entitlement can be justified only by a showing of *exceptional circumstances* . . . "

The Board's announcement failed to specify how the various "efficiency indices" were to be computed, or by whom. And, it was silent as to how the "standards of productivity" and "standards of quality" were to be established, by whom and under what circumstances. In any event, all of these considerations were indeed superfluous because the very most any employee could ever earn under the rating system was *"a strong presumption"* that *"he might qualify"* for the periodic statutory increase provided by Congress; and even if he failed to qualify, his supervisor could still grant the increase if he were willing to allege the existence of "exceptional" circumstance. Indeed, under the Agency's Regulations, it was expressly provided (*Govt's. Ex. 7, pg. 2*):

> " . . . the determination should be made on the basis of the extent to which the employee meets these standards, *unless, there is other contradictory evidence.*" (Italics supplied)

It was thus on the basis of these exceedingly vague, shifting, conflicting and contradictory "guidelines" that the Deputy Vice Chairman of the Board of Veterans' Appeals finally decided on June 26, 1963, *several days after the statutory waiting period fixing petitioner's right to the statutory pay increase had expired,* that petitioner's work was not of an acceptable level of competence (*Govt's. Ex. 2*).

This finding, of course, was made exclusively on the basis of a performance rating plan which the Government admits was never submitted to the Civil Service Commission for approval in accordance with the requirements of 5 U.S.C. 2002, 2003, and same was never approved by the Commission (*Stipulation of Facts*

#2). And, of course, the Government also concedes that the finding was made *after* the aforementioned statutory waiting period expired—whereas the Veterans Administration's own Regulations expressly required (*Govt's Ex. 7, pg. 2*):

> *"Notification to Employees.* . . . Employees on whom a determination is made that performance is not of an acceptable level of competence must be so notified in writing . . . (*T*)*he notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met* . . . " (Italics supplied)

In addition to the foregoing, the Board's late notification of June 26, 1963 (*Govt's. Ex. 2*) shows on its very face that petitioner's "10 months' *Cumulative Performance Record"* for the period just prior to June 1, 1963 fully entitled him, *after 30 years of federal service,* to favorable consideration, even under the Board's own arbitrary, capricious rating system.[2] The said Notice advised petitioner that his cumulative ratings for the said period were as follows:

| Overall Index | Quality | Production |
|---|---|---|
| 82.0 | 87.2 | 76.7 |

Comparing these figures with those specified in the Board's so-called "guide lines" (*Govt's. Ex. C*), the "Overall Index" figure of 82 is just 3 points short of the 85% level at which the "guidelines" say an employee "might qualify for regular within-grade promotion"; and 87.2 "Quality" figure is actually 7.2

[2] Especially since the Government also concedes that petitioner's ratings under the Performance Ratings Act were simultaneously "satisfactory or better."

above the 80% level at which it is stated "a strong presumption exists in favor of granting a regular within-grade promotion"; and the 76.7 "Productivity" figure is just 3 below the 80% at which an employee "might qualify" under the terms of the Board's system itself. Regarding "Quality", petitioner's overall average of 87.2 was not only good, it was excellent! Indeed, the Government's own exhibit shows that petitioner actually had a rating of 90 in "Quality" for one quarter and 91.7 for another. In this connection, of course, the Board's guidelines state (*Govt's. Ex. C, pg. 2*):

> "It would be unusual if an employee ever reached 100% quality and maintained it over a sustained period."

On the basis of this record, the Board clearly juggled and shaved the percentages under its own unapproved rating system to deprive petitioner of his lawful step increase in pay.

There is further sitpulated evidence in the record, however, to show that the Board's capricious, whimsical behavior did not end there. The Stipulation of Facts herein also demonstrates—

> (1) that other attorneys employed by the Board were granted their statutory pay increases under the Board's system at or about the same time petitioner's was denied, albeit their scores, under the Board's rating system, were substantially inferior to petitioner's; and
>
> (2) that petitioner himself was finally granted the statutory increase here in issue *one full year after it was due and owing,* although at that time

(in July, 1964) his cumulative scores under the Board's system were substantially lower than his cumulative scores up to May 31, 1963, when the adverse action was taken against him.[3]

Plaintiff, of course, thereafter filed suit in the Court of Claims under the provisions of 28 U.S.C. 1491. The parties thereupon filed cross-motions for summary judgment, and the Court of Claims decision dismissing the petition on the merits ensued.

## REASONS FOR GRANTING THE WRIT

The Court of Claims has held that the "Performance Rating Act (has) nothing to do with plans or guidelines which may be used for determining an employee's 'acceptable level of competence' under the Federal Salary Reform Act of 1962"; and that, since the Performance Rating Act is inapplicable, "there was clearly no requirement that such plan or guidelines be presented to or approved by the Civil Service Commission" (*C. Cls. Opinion,* pp. 2, 3).

The court below also ruled that it was unnecessary for it to determine whether petitioner's statutory rights under the Veterans' Preference Act of 1944

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[3] The Stipulation of Facts shows that petitioner's cumulative scores were as follows:

| | Overall | Quality | Productivity |
|---|---|---|---|
| In 1963, when increase denied | 82 | 87.2 | 76.7 |
| In 1964, when increase granted | 79.5 | 87.2 | 64.1 |

Of course, no one representing the Government has ever bothered to explain how "Quality" could remain at precisely 87.2 (down to the decimal point) over a full two-year period.

were violated when the Veterans Administration belatedly refused, on June 26, 1963, to accord him the statutory increase in pay which had accrued to him on June 23, 1963 under the terms of the Federal Salary Reform Act of 1962 (5 U.S.C. 1121), and the court thus failed to make any determination with respect to this important issue.

The Court of Claims also ruled that, albeit the Veterans Administration's own Regulations (Interim Issue 5-169, dated 10/18/62) specifically required that "Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing" and that "the notification shall be given *prior to the date on which the time-in-grade requirements for within-grade step increase will be met*",—it was unnecessary for the agency in this instance to follow those requirements because petitioner "must have known" (from various informal on-the-job discussions and communications he had during 1962, *before the "Acceptable level of competence" provisions were even enacted by the Congress)* and in early 1963 "that unless his work improved markedly, he would not be given a step increase" (*C. Cls. Opinion,* pp. 4, 5). The Court therefore concluded that *"The delayed notice of June 26, can therefore be disregarded as out of time, and still the agency-regulation's insistence on a pre-June 23rd notification was accomplished"* (*C. Cls. Opinion,* pp. 5, 6).

Finally, the court below also ruled, in effect, that Congress, when it passed the 1962 "acceptable level of competence" amendment to 5 U.S.C. 1121, had for all practical purposes licensed federal agencies to use unlimited discretion and to be generally arbitrary and whimsical in the matter of performance evaluations.

In this regard, the court held "statistical tallies of work-production and work-quality" were appropriate measuring rods for professionals working for the Government—*"even for adjudicators"*; and that even where such mechanical evaluation plans are adopted, supervisory officials still have the unfettered right "to take into account other (unspecified) factors" and to operate entirely "open-ended" work measurement plans to rate the performance of its federal employees (*C. Cls. Opinion*, pp. 6, 7). Indeed, the court even ruled that because "the agency could *properly* consider elements other than the numerical indices", it did not violate petitioner's constitutional rights and it was not unlawfully arbitrary and capricious for the agency simultaneously to deny the statutory pay increase to petitioner and to grant it to other attorneys "with similar or lower scores" under the agency's announced performance rating system.

These holdings, we respectfully submit, are both patently erroneous and of importance to all classified federal employees and to all the federal agencies which must establish and maintain lawful and constitutional performance rating plans and which must lawfully and constitutionally administer the "acceptable level of competence" provisions of 5 U.S.C. 1121, as amended in 1962 and 1965.

**I. Performance Evaluation Plans Under 5 U.S.C. 1121 Must Meet the Minimum Standards Prescribed by the Performance Ratings Act**

The whole purpose of the Performance Ratings Act of 1950 is spelled out in 5 U.S.C. 2002. That law was passed by Congress to require each federal agency to "establish and use *one or more performance rating plans for evaluating the work performance of (its)*

*officers and employees".* Having enacted this requirement for each department, Congress specifically provided that *no such plan* was to be used and *no personnel action of any kind* was to be based on any such plan, *which had not first been submitted to and approved by the Civil Service Commission.* Congress likewise made certain that this *absolute prohibition* could not be evaded or avoided in the event the name, nature or purpose of any particular performance rating system was thereafter changed by law or administrative fiat. Consequently, 5 U.S.C. 2003 was enacted in such broad terms that its prohibition was expressly made to apply to *any and all unapproved performance rating plans "regardless of the name given to such rating".* In this connection 5 U.S.C. 2003 reads as follows:

> *"Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating,* and *no such rating shall be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter."* (Italics supplied)

Hence, we submit it to be clear that whether a federal employee's work performance be judged under the Veterans' Preference Act or the Federal Salary Reform Act of 1962 (5 U.S.C. 1121) or any other similar federal employee pay statute *which does not expressly preclude the applicability of the basic requirements of the Performance Ratings Act,* the latter is clearly apposite and the performance evaluation system used must (a) first be approved by the Civil Service Commission, pursuant to 5 U.S.C. 2003 and (b) it must meet the minimum "requirements for performance

rating plans" set forth in 5 U.S.C. 2004. This Court, of course, has consistently held that "It is a cardinal principle of (statutory) construction that repeals by implication are not favored", and that "When there are two acts upon the same subject, the rule is to give effect to both if possible" (*United States* v. *Borden Co.*, 308 U.S. 188, 198, 60 S. Ct. 182, 188; *United States* v. *Zacks*, 375 U.S. 59, 67, 68, 84 S. Ct. 178, 182, 183; *Bell* v. *United States*, 366 U.S. 393, 81 S. Ct. 1230).

In the case at bar, the Court of Claims' decision is directly contrary to that fundamental rule of federal statutory construction. Entirely absent any Congressional directive in the Federal Salary Reform Act of 1962 (5 U.S.C. 1121, the court below effectively repealed *by implication only* all of the statutory safeguards and protections of the Performance Ratings Act insofar as performance ratings for within-grade pay increases are concerned, and it ruled that each federal agency now possesses unfettered jurisdiction to adopt any "open-ended" work evaluation plan it might desire to rate the work performance of its civilian federal employees for pay increase purposes under 5 U.S.C. 1121.

The vital importance of this erroneous decision to federal employees throughout the Government is obvious. Until the decision in this case, it was verily believed that no performance rating system could be *"used as a basis for any (personnel) action"* until that system was first submitted to and approved by the Civil Service Commission (5 U.S.C. 2003); and if the Commission disapproved the system because it did not meet the basic requirements of the Performance Ratings Act, the system was forthwith to be revoked and discontinued (5 U.S.C. 2007). And inasmuch as 5 U.S.C. 2004 prescribed plain, simple minimum re-

quirements or standards to govern all such rating systems and since all had to be approved by the Commission, rating plans throughout the Government were generally uniform and easily understood by federal employees whose work performance was adjudged thereunder. Moreover, because of the express standards of 5 U.S.C. 2004, the performance of all federal employees under such systems necessarily had to *"be fairly appraised in relation to such requirements"* and there was no room for arbitrary or capricious agency behavior in performance evaluations. Now, however, by reason of the Court of Claims decision herein, each federal agency stands absolutely free to evaluate the work performance of its employees for the purpose of pay increase actions in almost any manner it pleases, and it can do this on the basis of any performance rating system it chooses to adopt, without the necessity of obtaining any prior approval from the Civil Service Commission.

All of this, of course, is not only directly contrary to the Congressional mandates so clearly set forth in the broadest possible terms in the Performance Ratings Act of 1950, but it also conflicts with the Congressional purpose underlying the recent 1965 amendment to 5 U.S.C. 1121 (Public Law 89-301), wherein Congress specifically directed the Civil Service Commission to establish "uniform procedures" to govern agency reconsiderations of adverse "acceptable level of competence" determinations, and that federal employees be entitled to appeal directly to the Civil Service Commission from all such adverse determinations.

In light of the foregoing, we respectfully submit that the administration of the entire federal pay increase system under 5 U.S.C. 1121 would immediately

be benefited if this Court would grant certiorari herein and reverse the decision of the Court of Claims; and thus direct that all "acceptable level of competence" ratings or evaluations, like all other federal employee work performance evaluations, are subject to the Performance Ratings Act, and that such evaluation systems, from the very beginning, must be approved by the Civil Service Commission and meet the basic requirements and standards prescribed by the Performance Ratings Act of 1950.

**II. The Veterans Administration Action, Which Took Away Petitioner's Statutory Pay Increase After Same Lawfully Accrued to Him, Reduced Petitioner in Compensation in Violation of His Rights Under the Veterans' Preference Act**

The record herein shows that petitioner is a veteran, entitled to all the statutory protections of the Veterans' Preference Act of 1944, as amended (5 U.S.C. 863). That statute provides that no veteran federal employee shall be reduced in compensation unless and until he receives 30 days' advance written notice, is given an opportunity to defend against such reduction, and in the event of an unfavorable ruling in the agency involved, he "shall have the right to appeal to the Civil Service Commission from (such) adverse decision".

Under the provisions of 5 U.S.C. 1121 (a), as amended in 1962, petitioner was lawfully entitled to "be advanced in compensation . . . *at the beginning of the next pay period following the completion of*" the prescribed time-in-grade. In the instant action, that occurred on June 23, 1963—and at that time, petitioner had received no written notice whatsoever (as required by the Veterans Administration's own Regu-

lations) that any determination had been made that his work was not of an acceptable level of competence.[4]

Thus, it has been petitioner's consistent position herein that, *absent the required advance notice of unacceptable competence,* the statutory pay increase, by the very terms of 5 U.S.C. 1121 itself, accrued to him on June 23, 1963. It has been petitioner's further position therefore, that once the said pay increase accrued, the Veterans Administration was powerless to revoke same or to reduce him to his old rate of compensation without full compliance with the provisions of the Veterans' Preference Act (See *Borak* v. *Biddle,* D.C. Cir. 1944, 141 F. 2d 278, cert. denied, 323 U.S. 738; *Chisholm* v. *United States,* 149 C. Cls. 8 (1960); *Clark* v. *United States,* 149 C. Cls. 836 (1960)).

The Court of Claims, of course, failed to reach this question at all because it erroneously ruled that on the basis of informal oral discussions and written memoranda which passed between petitioner and his supervisor in 1962 (*long before the "acceptable level of competence" provision was even written into 5 U.S.C. 1121 and before the applicable Veterans Administration regulation was even promulgated*) and during early 1963 (none of which involved the acceptable level of competence determination)—petitioner "*must have known* that, unless his work improved markedly, he would not be given a step increase". These oral communications and written memoranda,

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[4] The Government, contrary to the ruling of the Court of Claims herein, readily concedes that the *advance written* notice required by the Regulations was not given (*Govt's Ex. 3,* pg. 3). In this regard, the Chairman of the Board of Veterans' Appeals admitted: "It follows that the Veterans Administration requirement of written notice 'before' the due date was not literally complied with".

none of which involved the rating issue involved, clearly do not constitute the advance written notification required by the Veterans Administration regulations, and, as stated before, *the Chairman of the Board of Veterans Appeals readily admitted that such notice had never been given prior to June 23, 1963, when the pay increase accrued to petitioner.*

Hence, other questions of great importance to all veteran federal employees under the Veterans' Preference Act and the Federal Salary Reform Act of 1962 are necessarily presented by this case. *Can a federal agency, by the simple device of failing to make any determination at all as to its employees' "acceptable level of competence," extend or prolong the statutory waiting period carefully limited by Congress in 5 U.S.C. 1121?*

Or, when a federal agency fails to make such a determination before the statutory waiting period expires, *does the pay increase thus automatically accrue upon expiration of the waiting period?* And, in the case of veterans' preference employees, can any such accrued pay increase thereafter be revoked by a federal agency without full compliance with the requirements of the Veterans' Preference Act?

### III. The Veterans Administration Failed To Observe Its Own Regulatory Procedures and Hence the Adverse Action Against Petitioner Was a Nullity

As stated above, the Veterans Administration's applicable regulations emphasized that "Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing", and such notification "shall be given prior to the date on which the time-in-grade requirements for within-grade increase will be met" (Interim Issue

5-169, 10/18/62). The record also contains the following plain admission by the Chairman of the Board of Veterans' Appeals (Govt's. Ex. 3, pg. 3):

> "The due date . . . was June 23. The Deputy Vice Chairman's memorandum was dated and delivered June 26, 1963. It follows that the Veterans' Administration requirement of written notice "before" the due date was not literally complied with."

This Court has consistently ruled that when a federal agency proceeds against one of its federal employees under its regulations, it must scrupulously follow the requirements of its own regulations or the adverse personnel action is a nullity (*Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535).

Thus, this case presents a further important question to all federal classified employees as follows: Can a federal agency ignore or negligently avoid the requirements of its own regulations, and in the case of statutory in-grade pay increases, wait until after the pay increases are effective to notify employees that they are ineligible therefor? In light of the 1965 amendment to 5 U.S.C. 1121, such adverse determinations are now subject to reconsideration in the agency itself, and appeal to the Civil Service Commission (5 U.S.C. 1121 (c)). Should federal employees therefore be placed in a position by their own agency wherein all of these proceedings must transpire *after the statutory waiting period for the pay increase has expired? Or, more properly, should not this Court reverse the Court of Claims herein, and direct that where agency regulations require that such determinations be made prior to expiration of the statutory waiting period, they must be so made or be subject to nullification in the Courts?*

**IV. The Denial of the Pay Increase Herein Was Based on an Arbitrary, Capricious, Discriminatory, Unfair Performance Rating System, and It Was Thus Unlawful and Unconstitutional**

The Court of Claims recognized in its decision herein that "Mishandled discretion can, of course, be set aside" (*C. Cls. opinion,* p. 7). Still, it went on to rule again and again, as it approached the various examples of arbitrary, capricious shortcomings in the performance evaluation system here involved, that each was allegedly within the *"open-ended"* jurisdiction given to federal agencies by the 1962 Federal Salary Reform Act (5 U.S.C. 1121).

If the very brief and limited 1962 amendment to 5 U.S.C. 1121 is to be construed as authorizing each federal agency "to legislate at will" its own arbitrary standards for the granting or denial of federal statutory pay increases, then, we submit, the said 1962 amendment itself violates Article I, Sections 1 and 8 of the Constitution. In *Schechter Corp.* v. *United States,* 295 U.S. 495, this Court stated, at pages 529, 530:

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. . . . But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, *cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."* (Italics supplied).

Moreover, we submit that any rating system which admitedly arbitrarily and capriciously favors one federal employee over another with substantially the same or higher rating scores, solely because (as the Court of Claims found) the agency could properly consider elements not previously established or published, clearly discriminates against the latter employee and violates his property rights under the Fifth Amendment.

## CONCLUSION

For the foregoing reasons, and because this case presents important statutory and constitutional questions with respect to federal civilian pay and performance evaluation systems (*Bell* v. *United States,* 366 U.S. 393, 395, 81 S. Ct. 1230, 1232), it is respectfully submitted that this petition for a writ of certiorari should be granted.

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## APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 288-64

(Decided February 18, 1966)

DONALD S. CREAMER

v.

THE UNITED STATES

*Edward L. Merrigan*, attorney of record, for plaintiff.

*Robert D. Donlan*, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

By the Federal Salary Reform Act of 1962 (Part II of the Act of October 11, 1962, Public Law 87-793), 76 Stat. 832, 841, 847, § 701(a)(B), 5 U.S.C. § 1121, Congress changed the traditional criterion for step in-grade raises within the civilian federal service from "a current performance rating of 'Satisfactory' or better" to "work [which] is of an acceptable level of competence as determined by the head of the department." Plaintiff, who was denied an in-grade increase for the period ending June 23, 1963 because it was said that he did not meet this new condition, sues for the advance on the ground that it was illegally withheld. Most of the relevant facts have been stipulated, all are undisputed, and both parties move for summary judgment.

Mr. Creamer, a lawyer, served as a federal employee almost continuously from 1934 until he retired at the end of December 1964. From May 1946, he was an attorney-

adviser, or consultant, with the Veterans Administration's Board of Veterans' Appeal. It was his duty to draft proposed decisions for the Board on the various types of claims for veterans benefits which come before that busy tribunal. In 1962-1963, he held a GS-13 grade; during that year, the Board had almost fifty attorneys (called consultants) in that same grade. Mr. Creamer had, at all relevant times, an annual performance rating of "Satisfactory" or better, issued by the Board under the Performance Rating Act of 1950, 5 U.S.C. §§ 2001, *et seq* (1964 ed.). His period for an in-grade pay increase, if one was to be given, ended on June 23, 1963, and apparently covered the prior year. A determination was made that his work for those months was not "of an acceptable level of competence." The complaint is that, for several reasons, this finding was not legally made or effective, and that plaintiff is therefore entitled to the increase as a matter of law.

1. The first attack is on the validity of the performance evaluation plan used by the Board of Veterans Appeals to judge plaintiff's competence. For some time before June 1963 the Board had utilized, and made known to its consultants, rather elaborate "work measurement and performance standards" which gave numerical grades for the quantity of the employee's "production" and the quality of this "production", as well as for over-all performance. This gauge was one of the prime measuring devices used in appraising plaintiff's work. He says that this was wholly improper because the plan was never submitted to or approved by the Civil Service Commission, as required (in plaintiff's view) by the Performance Rating Act of 1950. That statute directs the various federal agencies to "establish and use one or more performance-rating plans for evaluating the work performance" of their officers and employees (5 U.S.C. § 2002); prohibits the giving of "a performance rating, regardless of the name given to such rating" or the using of any such rating "as a basis for any action, except under a performance-rating plan approved

by the Civil Service Commission as conforming with the requirements" of the Act (5 U.S.C. § 2003); and specifies the nature and content of acceptable performance-rating plans (5 U.S.C. §§ 2004-2005).

The worm in plaintiff's position is that these sections of the Performance Rating Act have nothing to do with plans or guidelines which may be used for determining an employee's "acceptable level of competence" under the Federal Salary Reform Act of 1962.[1] The Performance Rating Act applies to regular performance ratings, in the sense those have long been known throughout the Federal Government—the recurrent ratings which can lead to separation, reassignment, or demotion. In that piece of legislation Congress was dealing with that precise subject, and with personnel actions which are tied to such performance ratings, like in-grade raises prior to the 1962 Act. But Congress was not laying down general rules for all managerial evaluations of federal employees for any purpose. Certainly, for one thing, appraisals to determine promotions from one grade to another are not covered; nor is the granting of incentive awards or special honors. In 1962, Congress clearly abandoned, for in-grade raises, any connection with annual performance ratings. The old measure of "a current *performance rating* of 'Satisfactory' or better" (emphasis added) was deliberately dropped, and a new standard substituted which was wholly outside the structure of the Performance Rating Act (and its gradings of "outstanding", "satisfactory", and "unsatisfactory"). With the cutting of the connection to the Performance Rating Act, the definitions and requirements of that statute no longer had an impact on in-grade advances. As utilized in that area, the measurement standards of the

[1] If the Performance Rating Act is inapplicable, there was clearly no requirement that such plan or guidelines be presented to or approved by the Civil Service Commission. Neither the 1962 Act, the Executive Order or the Commission's regulations on in-grade increases under that statute imposed that requirement.

Board of Veterans Appeals did not comprise a "performance-rating plan" within the 1950 Act, but, rather, independent criteria with another aim.

This court has several times rejected claims that one provision or another of the Performance Rating Act controls federal personnel action under an independent statute. *Misuraca* v. *United States,* 135 Ct. Cl. 387, 394 (1956); *De Busk* v. *United States,* 132 Ct. Cl. 790, 796-97 (1955); *cert. denied,* 350 U.S. 988 (1956); *Atkinson* v. *United States,* 144 Ct. Cl. 585, 596-98 (1959); *Chisholm* v. *United States,* 149 Ct. Cl. 8, 11-13 (1960); *Allen* v. *United States,* 155 Ct. Cl. 598, 600 (1961); *Begendorf* v. *United States,* 169 Ct. Cl. 293, 297, 340 F. 2d 362, 365 (1965). The present case is another instance in which that Act, if confined to its proper scope, must be held irrelevant to a transaction and proceeding governed by separate legislation.

2. Plaintiff's second assault on the denial of the increase is that he was deprived of his right under Section 14 of the Veterans' Preference Act, 5 U.S.C. § 863 (1964 ed.), to a 30-day notice. The argument is in three steps (each of which defendant disputes): (a) under the 1962 Act, the Civil Service Commission regulations, and the Veterans Administration's own regulations, plaintiff automatically became entitled to the in-grade raise at the end of the period (June 23, 1963) unless he was properly notified in writing, *before that time,* that he was not to receive the benefit; (b) he did not receive such written notification until June 26, 1963—three days too late; and (c) it follows that, when he was belatedly notified of the denial on June 26th, the agency's action was equivalent to a reduction in his then compensation (which had already jumped on June 23rd), and under Section 14 of the Preference Act he should have been granted at least 30 days advance written notice before the reduction could become effective.

We do not test the sting of the first and third prongs of this argument, because we think that plaintiff obtained

adequate notice prior to June 23rd.[2] There was substantial compliance both with the Commission's general directive on notice,[3] and with the employing agency's regulations specifically demanding notice prior to the end of the in-grade period.[4] According to an unchallenged affidavit of plain-

[2] Plaintiff appears to concede—correctly so—that if he received proper prior notice he has no claim that his salary was illegally *reduced* (i.e., without the 30-day notice required by Section 14 of the Veterans' Preference Act) though he may have been denied pay to which he was entitled on other grounds.

[3] The Commission regulation, 5 C.F.R. § 531.407(b) (1964), directs that whenever the agency determines that the employee's work is not of an acceptable level of competence the employee should receive "A prompt, written notice of that determination."

[4] Veterans Administration Interim Issue 5-169, dated Oct. 18, 1962, provided in pertinent part: "*Notifications to employees.* Specific notification to employees whose work is considered to be of an acceptable level of competence is not required. Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing. Except for those determinations required with respect to an effective date of October 14, 1962, by reason of the provisions of the Federal Salary Reform Act of 1962, the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met. This notification shall be signed by the supervisor making the original determination and the higher-level supervisor having responsibility for confirming such unfavorable determinations. The notification shall include:

"*a.* Reasons for the determination, including specific areas in which the employee's performance has been less than competent. (*Note:* Where the determination is based on a pending 90-day warning of unsatisfactory performance or a written notice of intent to demote or remove for cause, reference to such fact will suffice.)

"*b.* The date, within the next 52 calendar weeks, by which a new determination will be made.

"*c.* The employee's right upon written request within 10 days of his receipt of the notification, to seek reconsideration of the determination. Information about how to initiate such reconsideration also should be included.

"*d.* A statement that a copy of the notification will be placed in the employee's official personnel folder." [Emphasis in original.]

tiff's supervisor: (i) Mr. Creamer was informed, at the end of each calendar quarter, of his standing as measured by the Board's performance criteria and was told weekly of the recorded amount of his "production"; (ii) the supervisor personally discussed with plaintiff, in June, August, September, and December 1962, and at other times, the fact that he was not performing up to the standard expected of attorneys of his grade; (iii) in August 1962, a high official of the Board advised plaintiff by written memorandum that his work was below acceptable standards (as well as indicating specific ways in which he was deficient); and (iv) for the quarter ending March 31, 1963, plaintiff was given a written report showing that he was below average in production, quality, and over-all efficiency, and was orally advised that these facts raised a strong presumption that a regular in-grade salary increase was not warranted. We consider this course of conduct during the critical year, especially the written report as of March 31, 1963, to be adequate satisfaction of the Veterans Administration's internal requirement that "the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met [*i.e.* June 23, 1963]." See *Borak* v. *Biddle*, 141 F. 2d 278, 281 (C.A.D.C. 1944), *cert. denied*, 323 U.S. 738. All the major objectives of this notice-provision were fulfilled by the agency's communications in 1962 and 1963, written and oral, to plaintiff; he must have known that, unless his work improved markedly, he would not be given a step increase. The delayed notice of June 26th can therefore be disregarded as out of time, and still the agency-regulation's insistence on a pre-June 23rd notification was accomplished.[5]

3. Plaintiff urges, also, that his supervisors acted arbitrarily and capriciously in evaluating his level of com-

[5] The Commission's more general directive of a "prompt written notice" (see fn. 3, *supra*) was satisfied by the formal notice of June 26th, together with the prior communications.

petence. At the time of their determination, there was no review by the Civil Service Commission of such denials.[6] We must therefore pass on the claim of arbitrariness without the benefit of Commission assessment. We start, however, with the premise that the employing agency had considerable leeway in deciding whether an employee had reached and maintained "an acceptable level of competence." This is indicated, first of all, by the words Congress used—"acceptable" necessarily implies discretion and choice; a judgment of "competence" plainly invokes evaluation, appraisal, and assessment; "as determined by the head of the department" shows that no mechanical or automatic standard was being imposed by this statute, as had been the case under the prior law when a performance-rating of "Satisfactory" was all-sufficient. Next, the legislative history suggests that Congress sought, throughout the 1962 Act, to construct a pay system which provided for "executive discretion to meet individual and special needs, to use pay for motivating employees, and to initiate general adjustments as required." See "Statement of Purpose and Justification and Section-by-Section Analysis of the Legislation Requested by the President of the United States to Reform the Major Federal Statutory Salary Systems", Committee on Post Office and Civil Service, House of Representatives, February 28, 1962 [Committee Print], p. 1. See, also, S. Rept. No. 2120, 87th Cong., 2d Sess., p. 24 (1962). The President's Executive Order No. 11073, 28 Fed. Reg. 203, 205 (1963), implementing the new in-grade provision, told the Civil Service Commission "to insure that *only* those employees whose work is of an acceptable level of competence receive step-increases * * *" (emphasis added). The commission's regulation, 5 C.R.F. § 531.407(a), follows this

[6] Congress has since provided for Commission review. Section 3 of the Federal Employees Salary Act of 1965, Public Law 89-301, Act of October 29, 1965, 79 Stat. 1111, 5 U.S.C. 1121(c). See S. Rept. No. 910, 89th Cong., 1st Sess., p. 5 (1965); H. Rept. No. 792, 89th Cong., 1st Sess., pp. 6, 34 (1965).

wording and places the determination in "the head of the department, or a person authorized to act on his behalf." All this adds up to a large grant of discretion to the department head and his delegates. Mishandled discretion can, of course, be set aside (see, *e.g.*, *Gadsden* v. *United States*, 111 Ct. Cl. 487, 490, 78 F. Supp. 126, 127-28 (1948)), but the court should not be quick to find an abuse.

In setting out the deficiencies he sees, plaintiff contends that the agency's discretion was exceeded by the mere use of the numerical "Work Measurement and Performance Standards" issued by the Board of Veterans Appeals. Our view differs. As we have already held, those guidelines did not have to be presented to or approved by the Civil Service Commission. In itself, the use of such measuring devices cannot be called arbitrary; though many professionals decry statistical tallies of work-production and work-quality, there are others (including the Judicial Conference of the United States, in some respects) who hold them appropriate even for adjudicators. A choice either way lies within the realm of responsible opinion. It is also said that the Board's work-measurement standards were defective because they were not conclusive but merely created a "strong presumption" of eligibility or non-eligibility for the in-grade increase, leaving it to the supervisory officials to take account of other factors (many specified in the Board's regulation) as warranted.[7] Again, adoption of this "open-ended" aspect of the work measurement plan was within the agency's jurisdiction under the 1962 Act; it has long been the rule that, where administrative discretion is to be exercised, proper place can be made for relevant individual circumstances; rigid formulas, to be strictly followed, need not be established. *Cf. Securities and Exchange Comm.* v. *Chenery Corp.*, 332 U.S. 194, 201-03 (1947).

[7] More generally, the Veterans Administration's over-all regulation on in-grade increases (Interim Issue 5-169, Oct. 18, 1962) directed the use of performance on work standards, where established, "unless there is other contradictory evidence."

The Civil Service Commission recognizes that specific work standards are not conclusive, although they control "ordinarily." Federal Personnel Manual, Chap. 431, Section 4-9.

Two more-limited charges of capriciousness are advanced. One is that, while plaintiff was denied an in-grade increase in June 1963, he was granted one in July 1964 even though his numerical ratings, according to the Board's guidelines, were lower (at least no better).[8] This showing does not persuade us that the agency was arbitrary. As plaintiff himself points out, and we have just discussed, the numerical scores were not definitive. The record shows, without dispute, that in 1962-1963 plaintiff's supervisors felt strongly both that he intended "to do only enough to get by" (because of his feeling that he had been mistreated by management) and that he could easily come up to the proper standards if he desired. Moreover, his over-all efficiency index for May 1963—not cited by plaintiff, but relevant because it was immediately prior to the end of the in-grade period—was only 59.3 (with a production index of 31.6), far below the Board's standard of acceptability.

---

[8] With respect to the denial in June 1963, plaintiff cites the following scores:

| | *Production* | *Quality* | *Overall* |
|---|---|---|---|
| Quarter ending Sept. 30, 1962 ..... | 79.1 | 83.8 | 81.5 |
| Quarter ending Dec. 31, 1962 ..... | 71.2 | 91.7 | 81.5 |
| Quarter ending March 31, 1963 ..... | 70.0 | 90.0 | 80.0 |
| April 1963 ..... | 116.3 | 79.5 | 97.9 |
| 10 months (cumulative) to April 30, 1963 ..... | 76.7 | 87.2 | 82.0 |

Though not cited by plaintiff, the record shows the following for the six-month period from Jan. 1, 1963 through June 30, 1963:

| *Production* | *Quality* | *Overall* |
|---|---|---|
| 64.0 | 88.5 | 76.3 |

With respect to the approval of an increase in July 1964, plaintiff cites the following:

| | *Production* | *Quality* | *Overall* |
|---|---|---|---|
| 3 mos. prior to approval ..... | 64.1 | 87.2 | 79.5 |

These factors, which are not indicated to have existed in 1964, are enough to acquit the plaintiff's supervisors of arbitrariness in 1963.

The other specific claim is that plaintiff was deprived of his increase while a few other Board attorney-consultants with similar or lower scores received theirs. Here, too, plaintiff forgets that the agency could properly consider elements other than the numerical indices. The Board's written report on the performance scores of its legal consultants, as well as other documents in the record, show, so far as we can tell, that the supervisors had rational reasons for granting step raises to the others with low statistical ratings.[9] At the least, plaintiff has not demonstrated that the distinctions the Board drew were irrational or baseless.

4. The plaintiff's final challenge, to the constitutionality of the in-grade step increase section of the 1962 Act, must likewise be rejected. In the light of the Act's legislative history, the prior experience of the agencies of the Federal Government in evaluating their personnel, and the latitude given to the Federal Government as employer, we must hold that "an acceptable level of competence" is a valid, not unduly general, standard to apply in deciding who should have in-grade raises. *Cf. Fahey* v. *Mallonee*, 332 U.S. 245, 249-53 (1947); *Lichter* v. *United States*, 334 U.S. 742, 784-86 (1948); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896-97 (1961). Plaintiff also contends that he was deprived of property without due process because the Board of Veterans Appeals acted improperly and arbitrarily toward him. Since we have held that this was not so, the constitutional claim falls, too.

Plaintiff's motion for summary judgment is denied and defendant's motion is granted. Plaintiff is not entitled to recover and his petition is dismissed.

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[9] Such as the subjective impressions of the supervisors, inexperience of the employee, marked progress by an employee, very good ratings prior to the particular evaluation period, unusual assignments, complexity of work.

## APPENDIX B

I. The Performance Ratings Act, enacted by Congress in 1950, provides at 5 U.S.C. § 2003:

> "*Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating,* and no such rating shall be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter." (Italics supplied)

The said Performance Ratings Act of 1950 also provides at 5 U.S.C. 2004:

> "*Requirements for performance-rating-plans* — Performance-rating plans required by this chapter shall be as simple as possible, and each such plan shall provide—
>
> (1) that proper performance requirements be made known to all officers and employees;
>
> (2) that performance be fairly appraised in relation to such requirements; . . .
>
> (5) that each officer and employee be kept currently advised of his performance and promptly notified of his performance rating."

The said Performance Ratings Act further provides, at 5 U.S.C. 2005, in pertinent part:

> "*Ratings for Performance; warning prior to rating of unsatisfactory* . . . No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and reasonable opportunity to demonstrate satisfactory performance."

Finally, the said Performance Ratings Act of 1950 provides at 5 U.S.C. 2007, as here pertinent:

> *"Regulations; inspection and revocation of approval of plans . . .*
>
> (b) The (Civil Service) Commission shall inspect the administration of performance rating plans by each department to determine compliance with the requirements of this chapter and the regulations issued thereunder.
>
> (c) Whenever the Commission shall determine that a performance rating plan does not meet the requirements of this chapter and the regulations issued thereunder, the Commission may, after notice to the department, giving the reasons, revoke its approval of such plan.
>
> (d) After such revocation, such performance-rating plan and any current ratings thereunder shall become inoperative, and the department shall thereupon use a performance-rating plan prescribed by the Commission."

II. Until October, 1962, classified officers and employees of the United States compensated on a per annum basis were, in accordance with the provisions of 5 U.S.C. 1121 (B), entitled to periodic step increases in pay subject to the condition, *inter alia*,

> "(B) That he has a current performance rating of "Satisfactory" or better . . ."

In 1962, Congress, by Public Law 87-793, amended 5 U.S.C. 1121 (B) to make it read as follows:

> "(B) That his work is of an acceptable level of competence as determined by the head of the department . . ."

In 1965, *prior to the decision of the Court of Claims herein,* Congress further amended 5 U.S.C. 1121 by adding thereto a new subsection (c), which reads as follows (Public Law 89-301):

> "(c) Whenever a determination is made under subsection (a) of this section that the work of an officer or employee is not of an acceptable level of competence, he shall be given prompt written notice of that determination and an opportunity for reconsideration of the determination within his department under uniform procedures established *by the Commission.* If the determination is affirmed upon reconsideration, the employee shall have *a right of appeal to the Commission.* If the reconsideration on appeal results in a reversal of the earlier determination, the new determination shall supersede the earlier determination and shall be deemed to have been made as of the date of the earlier determination . . ." (Italics supplied)

Regarding the procedure to be followed in cases where employees are to be denied step increases in pay because of an alleged *unacceptable level of competence,* the Veterans' Administration's own Regulations state (VA Manual MP-5, Chap. 2, Interim Issue 5-169):

> *"Notifications to employees*— . . . Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing. Except for those determinations required with respect to an effective date of October 14, 1962, by reason of the provisions of the Federal Salary Reform Act of 1962, *the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met.* This notification shall be signed by the supervisor making the original determination and the

higher-level supervisor having responsibility for confirming such unfavorable determinations. The notification shall include:

(a) Reasons for the determination, including specific areas in which the employee's performance has been less than competent. NOTE:—Where the determination is based on a pending 90-day warning of unsatisfactory performance or a written notice of intent to demote or remove for cause, reference to such fact will suffice.)

(b) The date, within the next 52 calendar weeks, by which a new determination will be made.

(c) The employee's right upon written request within 10 days of his receipt of the notification, to seek reconsideration of the determination. Information about how to initiate such reconsideration also should be included.

(d) A statement that a copy of the notification will be placed in the employee's official personnel folder." (Italics supplied)

III. The Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. § 863) provides, in pertinent part:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, . . . or department . . . shall be discharged, suspended for more than thirty days, furloughed without pay, *reduced* in rank *or compensation* . . . except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose . . . reduction in rank or compensation is sought shall have at least thirty days' advance written notice . . . . stating any and all reasons, specifically and in detail, for any such pro-

posed action; *and such preference eligible shall . . . have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting,* such appeal to be made in writing within a reasonable time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, *in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission;* after investigation and consideration of the evidence submitted, *the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer . . . and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .*" (Italics supplied)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No. 155

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DONALD S. CREAMER, *Petitioner*

v.

THE UNITED STATES

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**
**BRIEF OF AMICUS CURIAE GOVERNMENT EMPLOYES' COUNCIL, AFL-CIO**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No. 155

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DONALD S. CREAMER, *Petitioner*

v.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**
**BRIEF OF AMICUS CURIAE GOVERNMENT EMPLOYES' COUNCIL, AFL-CIO**

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## INTRODUCTION

This brief of Amicus Curiae is filed pursuant to Rule 42 of the Supreme Court Rules with the consent of all parties to this case.

The Government Employes' Council of the American Federation of Labor and Congress of Industrial Organizations (hereinafter referred to as "the Council") consists of 31 AFL-CIO unions, representing federal employees, the combined membership of which

totals approximately 1,000,000 federal employees, or about 45% of all persons employed by the United States Government. Historically, the Council and its associated unions have been deeply interested in all important legal questions and legislative matters which critically affect employees of the United States; and, because the instant case involves three such questions of substantial importance to federal employees generally, the Board of officers of the Council voted unanimously to file this brief to urge the Court to grant a writ of certiorari herein and to settle authoritatively the issues raised by the decision of the Court of Claims, which decision the Council believes to be erroneous, unsound and detrimental to all classified federal employees.

## QUESTIONS PRESENTED

As stated above, this case presents three questions of serious importance to federal employees generally. These questions are as follows:

1. May federal agencies arbitrarily deny in-grade statutory pay increases to their employees under 5 U.S.C. 1121 through the adoption and use of performance rating systems which do not meet the standard minimum requirements of the Performance Ratings Act of 1950 and which violate the prohibitions of 5 U.S.C. 2003, which bar the use of rating systems not specifically approved by the United States Civil Service Commission?

2. May federal agencies, in violation of the prohibitions or restrictions of their own Regulations and of the statutory protections afforded to veterans' preference federal employees by the Veterans Preference Act of 1944, reduce or cancel statutory increases in pay which have already ac-

crued to such employees and simultaneously deny the right of any appeal to the Civil Service Commission?

3. Whether the "Acceptable Level of Competence" provisions of the Federal Salary Reform Act of 1962 (5 U.S.C. 1121 (a)), as arbitrarily and capriciously applied in the case before the Court as set forth in the petition for certiorari, violate Article I, Sections 1 and 8 of the Constitution and the Fifth Amendment to the Constitution?

## STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix A hereto.

## REASONS WRIT SHOULD BE GRANTED: ARGUMENT

### I

### Performance Evaluation Systems Under 5 U.S.C. 1121 Must Meet the Minimum Standards Prescribed by the Performance Ratings Act and They Must Not Violate the Prohibitions of 5 U.S.C. 2003.

The Council and its constituent unions earnestly submit that performance evaluation systems adopted by federal agencies to test the competence of federal employees under 5 U.S.C. 1121 must meet the minimum uniform standards prescribed for *all* performance ratings systems in the federal service by the Performance Ratings Act of 1950 (5 U.S.C. 2003); and that no such system can be administered by any federal agency until such system has first been approved by the Civil Service Commission in accordance with the requirements of 5 U.S.C. 2003.

The "acceptable level of competence" standard as prescribed by 5 U.S.C. 1121 as a statutory condition precedent to the granting of periodic in-grade pay increases for classified federal employees constitutes nothing more than simply another type of performance rating prescribed by Congress for federal employees. Accordingly, it is submitted that such ratings system, like all others in the federal service, is clearly subject to the prohibitions of 5 U.S.C. 2003, which states:

> "*Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating, and no such rating shall be used as the basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter.*" (Emphasis added)

If the Court concurs with the Council that the "acceptable level of competence" rating required by 5 U.S.C. 1121 is merely another type of *performance rating system,* then obviously the Court of Claims erred in its decision herein when it refused to apply the prohibitions of 5 U.S.C. 2003 to the performance evaluation system used by the Veterans Administration (*without any approval by the Civil Service Commission*) to deny petitioner his statutory in-grade increase in pay. The Council submits that what the Court of Claims did was to repeal judicially the prohibition of 5 U.S.C. 2003 insofar as same was intended to apply to *all* performance rating systems in the federal service, irrespective of the name or label given to such systems; and it did this by failing to apply the time-honored maxim that "where there are two Acts upon the same subject, the rule is to give effect to both if possible" (*United States* v. *Borden Co.*, 308 U.S. 188, 198; *United*

*States* v. *Zacks*, 375 U.S. 59; *Bell* v. *United States*, 366 U.S. 393).

As pointed out in the petition for certiorari herein, the vital significance of the erroneous decision of the Court of Claims to federal employees generally is quite apparent. Until the ruling in this case, the Council and its constituent unions and members took it for granted that *no performance evaluation system, regardless of the label, name or tag which might be placed on it, could be used as the basis for any personnel action until that system was first submitted to and approved by the Civil Service Commission* (5 U.S.C. 2003); and if the Commission disapproved a rating system because it did not meet the prescribed minimum requirements of the Performance Ratings Act, the system involved was forthwith discontinued (5 U.S.C. 2007). And, since 5 U.S.C. 2004 set forth plain and simple minimum requirements or standards to govern all such rating systems and since all such rating systems had to be approved by the Commission, rating systems throughout the Government were generally uniform and evenly administered by the various federal agencies; and the performance of all federal employees under such systems had to be *"fairly appraised in relation to such requirements"* as required by 5 U.S.C. 2004(2) and consequently, there was no room for arbitrary or capricious agency administration of performance or competence evaluations. Now, however, because of the Court of Claims decision herein, each federal agency would appear to have the unfettered right to evaluate the work performance of its employees for the purpose of in-grade pay increases in almost any manner it pleases, and it can do this on the basis of any evaluation or ratings system it might choose

to adopt, without the necessity of obtaining any prior review or approval from the Civil Service Commission.

All of this the Council submits, is not only directly contrary to the Performance Ratings Act of 1950, but it also conflicts with the clear Congressional purpose behind the recent 1965 amendment to The Federal Salary Reform Act of 1962 (5 U.S.C. 1121) itself (Public Law 89-301), wherein Congress specifically directed the Civil Service Commission to establish "uniform procedures" to govern agency *reconsiderations* of adverse "acceptable level of competence" determinations, and that federal employees be permitted to appeal directly to the Civil Service Commission from all such adverse determinations.

Thus, the Council believes the basic integrity of the *entire federal performance ratings structure* may be in danger of administrative erosion if the inroads approved by the Court of Claims' decision in this case are permitted to stand. Accordingly, the Council urges that the petition for certiorari be granted in this case and it prays that, after full study of the issues involved, this Court will reverse the Court of Claims herein and decree that performance evaluation systems under 5 U.S.C. 1121, *like all others used in the federal service,* are subject to the minimum requirements and prohibitions of the Performance Ratings Act of 1950.

## II

**Federal Agencies Must Not be Permitted to Ignore and Violate the Prohibitions and Limitations of Their Own Regulations When They Evaluate Federal Employees Under 5 U.S.C. 1121; and They Must Not be Allowed to Extend or Defeat Statutory Waiting Periods for In-Grade Pay Increases Through the Mere Device of Failing to Evaluate Employees Before the Waiting Period Expires.**

Two of the most important decisions ever rendered by this Court insofar as federal employees are concerned were those in *Service* v. *Dulles,* 354 U.S. 363, and *Vitarelli* v. *Seaton,* 359 U.S. 535. In those cases, this Court established the rule that when any federal agency proceeds against a federal employee under its own Regulations, the agency must not ignore or violate any prohibitions, limitations or employee-protections therein prescribed; and, in the event an agency does ignore or violate its own Regulations, any adverse personnel action thereafter taken against the employee is null and void.

Yet, in the instant case, the Veterans Administration openly admitted that it did not follow its own Regulations when it denied an in-grade pay increase to petitioner herein and still the Court of Claims permitted that adverse personnel action to stand. The Agency's failure in this case was far from trivial. Its Regulations prescribed: "Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing", and such notification *must* "be given *prior* to the date on which the time-in-grade requirements for within-grade increase will be met."[1] This require-

[1] VA Manual MP-5, Chapt. 2 Interim Issue 5-169, October 18, 1962.

ment was basic and fundamental because Congress, in 5 U.S.C. 1121 specifically set forth the exact lengths of time federal employees were to be made to enact for their in-grade pay increases, and Congress stated that such increases were to take effect in each case immediately upon expiration of each such waiting period. Consequently, it is crystal clear that Congress did not intend that federal agencies were to have the right arbitrarily, capriciously or negligently to extend any waiting period under 5 U.S.C. 1121 through the mere device of failing to determine, *before the waiting period expired,* whether federal employees subject to agency jurisdiction had competently performed their work during the waiting period involved. However, in the case at bar, the Veterans Administration candidly conceded (Govt.'s E. 3, pg. 3):

> "The due date . . . was June 23. The Deputy Vice Chairman's memorandum was dated and delivered June 26, 1963. *It follows that the Veterans Administration requirement of written notice 'before' the due date was not literally complied with.*" (Emphasis supplied).

Thus, this case presents a second set of very important questions insofar as the Council and its constituent unions and members are concerned. May a federal agency ignore, violate or negligently overlook the requirements of its own Regulations in the denial of statutory in-grade pay increases; and may it thereby wait, in contravention of the prohibitions of those Regulations, until after a pay increase has already become due under 5 U.S.C. 1121 to notify a federal employee that the agency has decided that he is not eligible to receive that increase in pay? Or, having admittedly failed to comply with its *own* agency Regulation which speci-

fies that, under 5 U.S.C. 1121, each employee *MUST be fully and specifically notified in writing prior to the end of the statutory waiting period that the agency has determined he is not eligible,* may the agency nevertheless sustain its illegal denial of the increase by alleging, as the Court of Claims held, that the employee should have surmised (from various conversations and correspondence he had with one of his supervisors) that his work was below average—*albeit such conversations and correspondence concededly were never intended by the supervisor or the employee involved to constitute the statutory determination as to the right of the employee to receive the pay increase provided by 5 U.S.C. 1121?*

The Council submits that such loose procedures, if approved by this Court, would constitute an open invitation to administrative arbitrariness and capriciousness by federal agencies—and classified federal employees, who in many cases are unfortunately subject to the whims of unfair or biased supervisors, would never be certain when an agency had actually or finally decided that they were not eligible for the statutory pay increase provided by 5 U.S.C. 1121. A resulting situation of even *greater importance* is that such federal employees would be left completely in the dark as to when their right to appeal to the Civil Service Commission from an adverse determination, as authorized under 5 U.S.C. 1121, as amended by Congress in 1965, actually might accrue. Under the Court of Claims decision, that right conceivably could accrue merely on the strength of a conversation conducted between the employee and his supervisor several months *before* the statutory waiting period necessary for the pay increase provided under 5 U.S.C. 1121; or under

the Court of Claims decision, that right might be postponed or defeated by the agency through the simple device of delaying a final determination of eligibility until after the pay increase was due under 5 U.S.C. 1121.

The Council earnestly suggests that again, therefore, this Court should grant the petition for certiorari herein and settle the important questions thus presented once and for all. Such action is particularly necessary in the case of veterans' preference federal employees who are entitled to the benefits and statutory safeguards prescribed by the Veterans Preference Act of 1944, as amended. In the case at bar, the petitioner contended, quite correctly the Council believes, that once the statutory pay increase accrued in his favor at the end of the statutory waiting period prescribed by 5 U.S.C. 1121, that pay increase could not be taken away from him by the Veterans Administration *except as provided in the Veterans Preference Act* (5 U.S.C. 863). The latter Act, of course, states that no veteran federal employee shall be reduced in compensation unless and until he receives 30 days' advance written notice, until he afforded the opportunity fully to defend against the proposed reduction, and in the event of an unfavorable agency decision, is given the "right to appeal to the Civil Service Commission". In this case, none of these statutory safeguards were afforded to the petitioner and he was affirmatively notified by the Agency that he had no rights whatsoever under the Veterans Preference Act. The Court of Claims thereafter avoided the very serious questions, thus raised, by holding simply that it did not consider it necessary to "test the sting . . . of this argument" in the case at bar.

Consequently, the Court of Claims has left all other veterans preference classified federal employees in the position where they might be subject to the denial of a statutory pay increase several days or even several months after same has fallen due under 5 U.S.C. 1121, only to be told by the agency that this reduction in their statutory pay has been accomplished without any necessity for compliance with the Veterans Preference Act of 1944. Certainly, this is the gravamen of the Court of Claims decision in the case at bar, and the Council believes that any such holding, expressly or implied, is erroneous and that it should be overruled by this Court.

## III

### 5 U.S.C. 1121, as Applied in the Instant Case Arbitrarily and Capriciously to Deny Petitioner's Statutory Pay Increase, Is Unconstitutional

At pages 9 to 11 of the petition for certiorari herein, petitioner outlines the very arbitrary and capricious system and manner employed by the Veterans Administration to deprive him of the statutory pay increase prescribed by Congress in 5 U.S.C. 1121. This discriminatory action, the Council believes, stems from the fact that the performance evaluation system used by the Agency was unlawfully adopted and administered without *advance approval* of the Civil Service Commission, in violation of the prohibitions of 5 U.S.C. 2003.

But, as the Court of Claims suggested in its decision —"Mishandled discretion can, of course, be set aside". Unlike the Court of Claims, however, which finally failed to set aside the said "Mishandled discretion", the Council urges this Court to find that 5 U.S.C. 1121, *mishandled and arbitrarily applied as it was in the*

*case at bar,* is violative of Article I, Sections 1 and 8 of the Constitution and of the Fifth Amendment to the Constitution.

This question, of course, is as important to the Council and its constituent unions and federal employee members as those set forth in Sections I and II of this brief. Thus, if the Court grants the petition for a writ of certiorari herein, as the Council urges it to do, then the Council hereby seeks leave to be heard further on this phase of the case involving the constitutionality of 5 U.S.C. 1121, as it was arbitrarily and capriciously applied to deny petitioner his statutory increase in pay without due process of law.

## CONCLUSION

The Amicus Curiae respectfully submits, for the reasons stated, that the petition for writ of certiorari herein should be granted and the decision of the Court of Claims reversed.

Respectfully submitted,

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Washington, D. C.
*Attorney for Amicus Curiae*

## APPENDIX A

I. The Performance Ratings Act, enacted by Congress in 1950, provides at 5 U.S.C. § 2003:

> "*Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating,* and no such rating shall be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter." (Italics supplied)

The said Performance Ratings Act of 1950 also provides at 5 U.S.C. 2004:

> "*Requirements for performance-rating-plans*—Performance-rating plans required by this chapter shall be as simple as possible, and each such plan shall provide—
>
> (1) that proper performance requirements be made known to all officers and employees;
>
> (2) that performance be fairly appraised in relation to such requirements; . . .
>
> (5) that each officer and employee be kept currently advised of his performance and promptly notified of his performance rating."

The said Performance Ratings Act further provides, at 5 U.S.C. 2005, in pertinent part:

> "*Ratings for Performance; warning prior to rating of unsatisfactory* . . . No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and reasonable opportunity to demonstrate satisfactory performance."

Finally, the said Performance Ratings Act of 1950 provides at 5 U.S.C. 2007, as here pertinent:

> *"Regulations; inspection and revocation of approval of plans . . .*
>
> (b) The (Civil Service) Commission shall inspect the administration of performance rating plans by each department to determine compliance with the requirements of this chapter and the regulations issued thereunder.
>
> (c) Whenever the Commission shall determine that a performance rating plan does not meet the requirements of this chapter and the regulations issued thereunder, the Commission may, after notice to the department, giving the reasons, revoke its approval of such plan.
>
> (d) After such revocation, such performance-rating plan and any current ratings thereunder shall become inoperative, and the department shall thereupon use a performance-rating plan prescribed by the Commission."

II. Until October, 1962, classified officers and employees of the United States compensated on a per annum basis were, in accordance with the provisions of 5 U.S.C. 1121 (B), entitled to periodic step increases in pay subject to the condition, *inter alia,*

> "(B) That he has a current performance rating of 'Satisfactory' or better . . ."

In 1962, Congress, by Public Law 87-793, amended 5 U.S.C. 1121 (B) to make it read as follows:

> "(B) That his work is of an acceptable level of competence as determined by the head of the department . . ."

In 1965, *prior to the decision of the Court of Claims herein,* Congress further amended 5 U.S.C. 1121 by adding thereto a new subsection (c), which reads as follows (Public Law 89-301):

> "(c) Whenever a determination is made under subsection (a) of this section that the work of an officer or employee is not of an acceptable level of competence, he shall be given prompt written notice of that determination and an opportunity for reconsideration of the determination within his department under uniform procedures established *by the Commission.* If the determination is affirmed upon reconsideration, the employee shall have *a right of appeal to the Commission.* If the reconsideration on appeal results in a reversal of the earlier determination, the new determination shall supersede the earlier determination and shall be deemed to have been made as of the date of the earlier determination . . ." (Italics supplied)

Regarding the procedure to be followed in cases where employees are to be denied step increases in pay because of an alleged *unacceptable level of competence,* the Veterans' Administration's own Regulations state (VA Manual MP-5, Chap. 2, Interim Issue 5-169 dated 10/18/62):

> "*Notifications to employees*— . . . Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing. Except for those determinations required with respect to an effective date of October 14, 1962, by reason of the provisions of the Federal Salary Reform Act of 1962, *the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met.* This notification shall be signed by the supervisor making the original determination and the higher-level supervisor having responsibility for con-

firming such unfavorable determinations. The notification shall include:

(a) Reasons for the determination, including specific areas in which the employee's performance has been less than competent. (NOTE:—Where the determination is based on a pending 90-day warning of unsatisfactory performance or a written notice of intent to demote or remove for cause, reference to such fact will suffice.)

(b) The date, within the next 52 calendar weeks, by which a new determination will be made.

(c) The employee's right upon written request within 10 days of his receipt of the notification, to seek reconsideration of the determination. Information about how to initiate such reconsideration also should be included.

(d) A statement that a copy of the notification will be placed in the employee's official personnel folder." (Italics supplied)

III. The Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. § 863) provides, in pertinent part:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, . . . . or department . . . shall be discharged, suspended for more than thirty days, furloughed without pay, *reduced* in rank *or compensation* . . . except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose . . . reduction in rank or compensation is sought shall have at least thirty days' advance written notice . . . stating any and all reasons, specifically and in detail, for any such proposed action; *and such preference eligible shall . . . have the right to appeal to the Civil Service Commis-*

*sion from an adverse decision of the administrative officer* so acting, such appeal to be made in writing wtihin a reasonable time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, *in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission;* after investigation and consideration of the evidence submitted, *the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer . . . and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .*" (Italics supplied)

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 155

DONALD S. CREAMER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–10a) is not yet reported.

### JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1966. The petition for a writ of certiorari was filed on May 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

### QUESTION PRESENTED

Whether the Veterans' Administration unlawfully declined to grant petitioner a within-grade salary increase for the reason that his work was not of an



224-877—66——1

"acceptable level of competence," as required by the Federal Salary Reform Act of 1962.

## STATUTE INVOLVED

The Federal Salary Reform Act of 1962, Sec. 603, 76 Stat. 847, 5 U.S.C. 1121, provides in pertinent part:

> (a) Each officer or employee compensated on a per annum basis, and occupying a permanent position within the scope of the compensation schedules fixed by this chapter, who has not attained the maximum rate of compensation for the grade in which his position is placed, shall be advanced in compensation successively to the next higher rate within the grade at the beginning of the next pay period following the completion of (1) each fifty-two calendar weeks of service in salary rates 1, 2, and 3, or (2) each one hundred and four calendar weeks of service in salary rates 4, 5, and 6, or (3) each one hundred and fifty-six calendar weeks of service in salary rates 7, 8, and 9, subject to the following conditions:
>
> * * * * *
>
> (B) That his work is of an acceptable level of competence as determined by the head of the department * * *.
>
> * * * * *

## STATEMENT

Petitioner brought this action in the Court of Claims to recover $365 plus any additional back-pay that he alleged was or may be owing him as a result of his being denied a within-grade salary increase after he had become eligible for such an increase.

The basis of the denial was the refusal of his supervisors to certify that "his work [was] of an acceptable level of competence," as required by Sec. 603 of the Federal Salary Reform Act of 1962, 76 Stat. 847, 5 U.S.C. 1121. The Act provides that every government employee compensated on a per annum basis shall be advanced in compensation successively to the next higher rate within the grade provided that the employee meets certain enumerated conditions, including "[t]hat his work is of an acceptable level of competence as determined by the head of the department."

Petitioner was an attorney employed by the Veterans Administration Board of Veterans Appeals to draft Board opinions (Pet. App. 1a–2a). The Board has detailed written standards for the measurement of its attorneys' work performance, which give numerical grades for the quantity and quality of the employee's production as well as for his overall performance (Pet. App. 2a; Def. Exh. 1, p. 1).[1] Petitioner was informed at the end of each calendar quarter of his standing as measured by the Board's performance criteria, and was told weekly of the recorded amount of his production (Pet. App. 6a; Def. Exh. 1, p. 2). In June, August, September and December 1962, and at other times as well, his supervisor personally discussed the fact that his performance was far below the standard expected of attorneys of his grade (Pet. App. 6a; Def. Exh. 1,

[1] "Def. Exh." refers to the exhibits attached to the motion for summary judgment filed in the Court of Claims. They are included in the record filed with this Court.

pp. 2–4). In August 1962, the Deputy Vice Chairman of the Board advised petitioner by written memorandum that his work was below acceptable standards and indicated specific respects in which he was deficient (Pet. App. 6a; Def. Exh. E). And for the quarter ending March 31, 1963, petitioner was given a written report showing that he was "below average in production, quality, and overall efficiency," and was orally advised that these facts "raised a strong presumption that a regular within grade salary increase was not warranted" (Pet. App. 6a; Def. Exh. 1, p. 3). In May 1963, his overall efficiency and production indices were far below the Board's standard of acceptability (Pet. App. 9a; Def. Exh. 2). Throughout this period of time, "his supervisors felt strongly both that he intended 'to do only enough to get by' (because of his feeling that he had been mistreated by management) and that he could easily come up to the proper standards if he desired" (Pet. App. 9a; Def. Exhs. 1, 2, D, E).

On June 26, 1963, petitioner was informed in writing by the Deputy Vice Chairman that he would not receive an in-grade salary increase because that officer could not certify that his work was of "an acceptable level of competence" (Def. Exh. 2). The decision was appealed by petitioner through his attorney to the Chairman of the Veterans Appeals Board (Def. Exh. 3). An oral hearing was scheduled but counsel for petitioner withdrew the request and submitted his appeal on the briefs (Def. Exh. 3). The Chairman of the Veterans Appeals Board, after examining the

performance-standard measurement and making inquiry of the reviewers, affirmed the Deputy Vice Chairman and determined that petitioner's work was not of an acceptable level of competence (Def. Exh. 3, p. 7). The Chairman noted that official notification to petitioner of the Deputy Vice Chairman's decision had been delayed because the Deputy Vice Chairman and petitioner's supervisors "desired to wait until June figures were available in the hope they would afford justification for a favorable determination" (Def. Exh. 3, p. 4).

This action was filed on September 2, 1964. On cross-motions for summary judgment, the government's motion was granted and the petition dismissed. "In the light of the Act's legislative history, the prior experience of the agencies of the Federal Government in evaluating their personnel, and the latitude given to the Federal Government as employer," the Court of Claims, in a unanimous opinion by Judge Davis, held the "acceptable level of competence" provision of the 1962 Federal Employees Salary Reform Act to be "a valid, not unduly general, standard to apply in deciding who should have in-grade raises" (Pet. App. 10a). The court also held that the Performance Rating Act, 5 U.S.C. 2002–2005, was not applicable to an agency's guidelines for determining an employee's "acceptable level of competence" under the 1962 Salary Reform Act (Pet. App. 2a–4a); that the Board of Veterans Appeals had substantially complied both with the Civil Service Commission's general directive on notice and the Board's own regu-

lations (Pet. App. 4a–6a); and that the officials of the Board had not abused their discretion in denying the pay increase (Pet. App. 7a–10a).

## ARGUMENT

The contentions advanced by petitioner in support of his claimed right to an in-grade step increase in salary were carefully considered by the Court of Claims and found to be without merit. Further review is not warranted.

1. Petitioner contends that, in utilizing certain performance standards as a basis for determining that his work was not of an acceptable level of competence, the Board of Veterans Appeals failed to comply with the Performance Rating Act of 1950, which requires that "performance-rating plans" be approved by the Civil Service Commission. 5 U.S.C. 2003. However, the Performance Rating Act is inapplicable to determining acceptable levels of competence for purposes of awarding in-grade salary increases under the Federal Salary Reform Act of 1962—the very purpose of that Act, as the Court of Claims pointed out (Pet. App. 3a–4a), being to prescribe different criteria from those under the Performance Rating Act. See, *e.g.*, S. Rep. No. 2120, 87th Cong., 2d Sess., p. 24.

2. Petitioner contends that he did not receive adequate notice that his work was not of an acceptable level of competence prior to the date on which he became eligible for the increase, as required by the Veterans Administration's rules. The Court of Claims, finding substantial compliance with this requirement,

properly rejected petitioner's contention (Pet. App. 5a–6a). Not only was petitioner orally informed that his work was not up to the Board's standards of acceptable performance, but both in August 1962 and March 1963 he was informed in writing that his work was below average (Pet. App. 6a; Def. Exh. 1, p. 3, Def. Exh. E). He was specifically advised, almost three months before he became eligible for the in-grade increase, that his below-average performance "raised a strong presumption that a regular within-grade salary increase was not warranted" (Pet. App. 6a; Def. Exh. 1, p. 3).

3. Petitioner's final contention is that the application of the statutory criterion of "acceptable level of competence" to deny him a salary increase was arbitrary and capricious. Surely, however, the federal government, like other employers, is entitled to insist upon competent performance as a condition of salary increases and to exercise a broad discretion in determining competence. That discretion was not abused here. Petitioner's superiors strongly believed that petitioner intended "to do only enough to get by," and his overall efficiency index for May 1963—the last complete month before he became eligible for the increase—was far below the Board's standard of acceptability (Pet. App. 9a).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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